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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-84

LEE HILL, JOHNNY CLARK, FLOYD NORFLEET, NORMAN WILSON, THOMAS KELLY, PAUL LEONARD, LAWRENCE Y. LINGARD, JERRY B. WILLIAMS, FREDERICK T. WIMS, FRANCIS ROLLS, THOMAS E. BELL, EDWARD RAY, MARTIN FRANCKEN, ARNOLD WALKER, ALVIN RUE, ALVIN G. BAILEY, ROBERT WILLIAMS and CHARLES A. BURNETT,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NOS. 18,992-6, 19,215-20, 19,244, AND 19,304-9

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit denying a rehearing and affirming the District Court in the above-entitled case on April 29, 1971.

Citations to Opinions Below

The opinion of the Court of Appeals for the Third Circuit is unreported. It is printed in the Appendix, *infra*, pp. 1a-12a. The orders of the District Court for the Western District of Pennsylvania, remanding the causes of actions to the Allegheny County Court of Common Pleas are reported at 315 F. Supp. 215 (1970), for petitioners Leonard, Lingard, Williams, Wims, Rolls, Bell, 313 F. Supp. 1159 (1970) (for petitioners Hill, Clark, Norfleet, Wilson, Kelly). The opinions and orders remanding petitioners Ray, Francken, Walker, Rue, Bailey, Williams (Robert) and Burnett to the Allegheny County Court of Common Pleas have not yet been reported. Since all opinions are identical, only the first opinion relating to Petitioners Hill, Clark, Norfleet, Wilson and Kelly is set forth in the Appendix, *infra*, pp. 13a-18a. The Court of Appeals opinion is referred to as "CA" and the District Court Opinion is referred to as "DC".

Jurisdiction

The judgment denying a rehearing by the Court of Appeals was entered on April 29, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

Petitioners, while engaging in peaceful picketing designed to end trade union discrimination against Blacks and open up both union membership and job opportunities to themselves and their fellows, were arrested by members of the Pittsburgh Police Force and charged with unlawful assembly, inciting to riot, and conspiracy to commit an

unlawful act (in addition, petitioner Edward Ray was charged with aggravated assault and battery and assault and battery). All petitioners were indicted only on charges of inciting to riot (except petitioner Ray, who was also indicted on the additional charges). All petitions for removal (printed in the Appendix, *infra* at pp. 18a-27a is the removal petition of Hill, Clark, Norfleet, Wilson and Kelly which is identical to all other removal petitions involved in this case), were dismissed and all cases remanded by the District Court without a hearing, and the decision was upheld by the Court of Appeals on consolidated argument. Under these circumstances:

1. Have the petitioners stated a cause of action in their petition for removal?

2. Are the petitioners entitled to an evidentiary hearing prior to the remand of their case?

Statutes Involved

Section 245(b) of 18 U. S. C. § 245:

> "(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—
>
> (1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—
>
> (A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;
>
> (B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been—

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror,

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the prem-

ises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life. As used in this section, the term 'participating lawfully in speech or peaceful assembly' shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2) (F) or (4) (A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment, if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence."

Section 1443 of 28 U. S. C. § 1443:

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. June 25, 1948, c. 646, 62 Stat. 938."

Sections 1981, 1983, 2000-d, 2000 e-2 (a), (c) and (d) of 42 U. S. C.:

"§ 1981.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
R. S. § 1977

§ 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
R. S. § 1979

§ 2000e-2.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

§ 2000e-2.

(a) It shall be an unlawful employment practice for any employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or

otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

LABOR ORGANIZATION PRACTICES

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

TRAINING PROGRAMS

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

Statement of the Case [1]

On or about the latter part of 1968, in the City of Pittsburgh, Pennsylvania, various representatives from trade unions, contractors and Black organizations in that City began meetings to establish hiring levels and proposals for Black participation in union apprenticeships and training, and in the federally-funded Three Rivers Stadium, then being constructed. These talks continued off and on for approximately ten months.

Beginning in early August, 1969, as the talks dragged on with little apparent success, Black organizations began to organize and to carry their grievances directly to the public. On or about mid August these demonstrations were met with outward hostility by trade union construction workers and policemen via several attacks on the demonstrators, who suffered severe injuries including broken arms, pelting with rivets by the construction workers perched in and about the higher levels of the Stadium, and insults from both workers and policemen, particularly members of the Tactical Patrol Force of the City of Pittsburgh Police. On Tuesday, August 26, 1969, at the height of Black frustration and inactivity of the talks, hundreds of Black citizens and their supporters massed on the North Side of Pittsburgh and, following a rather brutal police attack on the demonstrators near the Manchester Bridge, split down into sub-groups who proceeded into the downtown area. Petitioners were parts of these sub-groups each of which numbered approximately fifty (50) persons. Peti-

[1] The Statement of the Case is based upon the allegations in the removal petitions, taken as admitted upon the Commonwealth's Motion to dismiss *Clark v. Nebessee Finanz Korporation,* 322 U. S. 480 (1947) plus additional facts petitioners have had no opportunity to present.

tioners were lawfully and peaceably engaged in the demonstration and as they were in and about various sidewalks in the City of Pittsburgh, attempting to enforce their affirmatively granted federal equal civil rights relating to employment, the right to contract, labor organization participation, job training and apprenticeships, and participation in the benefits of federally funded programs, they were arrested without cause by members of the City of Pittsburgh Police Department, and charged with various crimes.

Petitioners were on the way to an area where they intended to lawfully and peaceably picket so as to inform the public of the situation and thereby cause those with the power to do so, to enable petitioners to enforce their federal equal civil rights set forth above.

At the time of their arrest, petitioners were informing the public of the situation and therefore, also attempting to enforce their federal equal civil rights through (1) public information; (2) direct pressure of picketing and (3) peaceful confrontation with those with the executive power, such as the City, Trade Unions, Businesses and Contractors, to grant to Blacks that which they long denied them, and which are affirmatively granted federal equal civil rights.

As a direct consequence of those who did picket, the City of Pittsburgh withdrew funds for all financing on construction projects, all job sites were shut down, and immediate meaningful talks began.

The prosecution of petitioners commenced in the Police Magistrate's Court at No. 1 Police Station of the City of Pittsburgh, by the filing of comp'aints on August 26, 1969,

alleging charges of inciting to riot, unlawful assembly, and conspiracy to do an unlawful act, in violation of the statutory law and common law of the Commonwealth of Pennsylvania (except for Petitioner Ray who was in addition, charged with aggravated assault and battery and assault and battery).

Following a preliminary hearing in said court, petitioners were held for Grand Jury action on the charge of inciting to riot only (except for Petitioner Ray who was held on the additional charges of aggravated assault and battery, and assault and battery). Petitioners were each indicted by the Allegheny County Grand Jury on the charge of inciting to riot only (except for Petitioner Ray who was indicted on the aforesaid additional charges also) and now are awaiting trial in the Criminal Court of Allegheny County on said charge.

On May 19, 1970, petitioners Hill, Clark, Norfleet, Wilson and Kelly filed a joint petition for removal in the U. S. District Court for the Western District of Pennsylvania. On the same day Petitioner Ray filed a sole petition. On May 27, 1970, all other petitioners filed petitions for removal in the said District Court with Petitioners Francken, Walker, Rue, Bailey, Williams (Robert) and Burnett jointly filing and Petitioners Leonard, Lingard, Williams (Jerry B.), Wims, Rolls and Bell jointly filing.

Following separate oral argument only on each of the foregoing petitions and by orders of the Honorable Judge Wallace Gourley, District Court Judge dated June 9, July 9, August 20 and July 16, 1970, respectively, all of the cases were remanded to the Court of Common Pleas of Allegheny County. All cases were subsequently appealed to the United States Court of Appeals for the Third Circuit.

The appeals were consolidated for argument and were heard by the Court of Appeals for the Third Circuit. Relief was denied on March 18, 1971, and a petition for a rehearing was denied on April 29, 1971.

Reasons for Granting the Writ

Certiorari should be granted in this case because the decision of the Court of Appeals for the Third Circuit is in conflict with applicable decisions of this Court and is also in conflict with decisions of other courts of appeals, particularly the Court of Appeals for the Fifth Circuit on the same matter.

1. The petitioners have stated a cause of action in their petitions for removal. 28 U. S. C. Sec. 1443 (1) imposes several requirements for the validity of a removal petition. First, petitioners must rely upon laws providing for equal civil rights. In *Georgia v. Rachel*, 384 U. S. 780 (1966), this Court held that removal is authorized if, among other allegations, the Petitioner alleges that he is relying on a right under a law providing for equal federal civil rights, concluding: ". . . that the phrase 'any law providing for . . . equal civil rights must be construed to mean any law providing for specific civil rights stated in terms of racial equality." 384 U. S. at 792.

All of the statutes relied upon by Petitioners, to wit, Civil Rights Acts, Title 42, United States Code, Sections 1981, 1983, 2000-d and 2000 e-2 (a), (c) and (d), and Title 18, United States Code, Section 245 (b), are laws providing for specific civil rights stated in terms of racial equality. By specific civil rights it is not meant, as indicated by the Honorable Judge Gourley, that the statutes specifically permit marching (DC. 16a). Rather, that they specifically grant certain segments of the populace the right to have

an equal opportunity to compete for jobs and the benefits of certain government projects, to participate in labor organizations, and to receive training and apprenticeships.

This Court has already decided that both Sections 1981 and 1983 of Title 42 of the United States Code are such statutes. In *Rachel, supra,* this Court painstakingly traced the history of the removal statutes, and held: "We concluded, therefore, that *the model* for the phrase 'any law providing for . . . equal civil rights' . . . was the Civil Rights Act of 1886." 384 U. S. at 791 (Emphasis supplied).

In *Rachel, supra,* this Court rested its decision on the Public Accommodations Section of the Civil Rights Act of 1964. Thus it too, must be a statute, or body of statutes, which qualifies as a law providing for equal civil rights. There has not been any indication the Civil Rights Act of 1968 does not qualify to fulfill the requirements for removal.

2. The Honorable Judge Gourley ignored the broad allegation of the above laws designed to grant affimative federal equal civil rights and misread the opinion of this Court when he said in his opinion to remand the cases involved in this Petition to the State Courts:

> "Although the instant petition cites Sections 601 and 703 of the Civil Rights Act of 1964,[1] a review of those sections indicates that they afford no specific protection for the conduct of marching, in which petitioners allegedly were engaged. The activities protected by those Sections consist of seeking employment or participation in training or apprenticeship programs but do not include marching or assembling in order to express sentiments publicly . . . . . [1] 42 U. S. C. 2000-d and 42 U. S. C. 2000-2(a), (c) and (d)"

It is not necessary that the statutes specifically provide that marching is protected. In *Rachel*, Petitioners were

charged with trespassing. Although that activity, and "sitting in" were not protected specifically by statute, petitioners were protected because, at the time they were engaged in the activity, they were solely attempting to enforce their civil rights as affirmatively granted to them by the federal government by the Civil Rights Act of 1866 and, by the time the case was heard by the Supreme Court of the United States, the Civil Rights Act of 1964.

The Honorable Judge Gourley, at Page 4 of his opinion, DC 14a, correctly stated that Paragraph 5 of Petitioners' petition was central. However, he incorrectly concluded that no removal case had been stated by underlining that portion of the petitions which referred to peaceful picketing and ignoring the gravamen of the complaint and of that paragraph, *viz.*, that the picketing was taking place "solely for the purpose of enforcing the affirmatively granted federal equal civil rights . . . secured, guaranteed and protected by the constitution and laws of the United States, to wit the Civil Rights Act and in particular Title 42 United States Code, Sections 1981, 1983, 2000d and 2000e-2 (a) (c) and (d) and the First and Fourteenth Amendments of the U. S. Constitution."

3. Although accepting that Petitioners' claims under 18 United States Code Section 245(b) and 42 United States Code 1981 were meritorius, the Third Circuit Court of Appeals in its opinion (CA 3a) rejected Sections 2000-d and 2000e-2 (a), (c) and (d) of Title 42, United States Code, on the basis that Petitioners made no allegations that at the time of their arrests they were seeking employment or participation in training on apprenticeship programs and federally financed projects for themseves, but simply alleged they were encouraging others to do this.

A clear distinction must be made between the description of the physical conduct of Petitioners at the time of their arrests and their own intent at that time. For example, in many of the removal cases involving the public accommodations provisions of the Civil Rights Act of 1964, the petitioners were ordinarily sitting or attempting to be seated in public restaurants at the time of their arrests. At the same time by their "sit-in" they were attempting to enforce the federal equal civil rights under the said public accommodations provisions. Likewise, Petitioners in the instant appeal can not be said not to be enforcing their federal equal civil rights simply because they allege they were "marching" at the time of their arrest in support of negotiations then going on. To say that, begs the question since it is not unreasonable to see that by the march, they could be seeking, for themselves, for example, employment opportunities so long denied Blacks, knowing that public information, direct picketing pressure, and peaceful confrontation with local government, business and industry leaders, could lead to immediate and practical effects such as a job opening. As a matter of fact the picketing did exactly that since the very next day, August 27, 1969, the City of Pittsburgh withdrew all funds for financing construction projects, all job sites were shut down, and immediate meaningful talks began for the first time in almost a year. Moreover, a close reading of the removal petition themselves fairly alleges that Petitioners were seeking the labor equal civil rights for themselves at the time of their arrests, and that the distinction discussed above between their physical conduct and intent was set out. In each petition, paragraph 4 is a description of their physical conduct at their arrest, namely participation in a "march in support of the desire of all Black citizens, and in particular members of the Black community in Pittsburgh and their

representatives in contract negotiations, the Black Construction Coalition" to not be discriminated against in hiring, union membership, training programs and federally financed projects. Paragraph 5 in each case then alleges their intent at the time of their arrest which was that they were marching to enforce their federal equal civil rights discussed above.

4. The District Court and the Circuit Court both concluded that Petitioners' claims were governed by *City of Greenwood v. Peacock*, 384 U. S. 808 (1966).

The District Court's holding was primarily based on the conclusion that Petitioners had not in any way alleged a removal setting. It was suggested that this was purely a First Amendment situation. The erroneous nature of their conclusion is fully discussed in paragraphs 2 and 3 above. The Circuit Court's finding rested basically on the conclusion that a displacement of State Law by Federal Law was the only basis to meet the "clear prediction" test enunciated in *Peacock* by this Court. It is submitted that this is an incorrect interpretation of this Court's holding in *Peacock*.

In *Peacock* the petitioners relied heavily on general civil rights such as the First Amendment rights to freedom of speech and peaceable assembly. These clearly were not the "equal civil rights" necessary for removal. Much of the *Peacock* case and its opinion also dealt with the meaning of 28 U. S. C. § 1443(2), the second half of the removal statute. As to § 1443(1), this Court merely reiterated its holding in *Georgia v. Rachel*, *supra* that removal would be denied "except in the rare situations where it can be *clearly predicted* by reason of the operation of a pervasive and explicit *state or federal law* that those rights will inevitably be denied by the very act of bringing the defendant to

trial.", at page 828 (emphasis supplied) citing *Rachel, supra* and *Strauder v. West Virginia*, 100 U. S. 303 (1880). As stated in *Rachel, supra*, by this Court in reviewing its prior removal decisions, "The Court thereby gave some indication that removal might be justified, even in the absence of a discriminatory State enactment, if an equivalent basis could be shown for an equally firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights in the state court" (at page 804).

Reading both *Rachel* and *Peacock* together, it is apparent that this Court did not limit removal cases falling in the "clear prediction" category to *only* those cases where federal law displaces state law, substituting a right for a crime, such as the public accommodations cases, since state or federal laws may become the basis of the clear prediction. As argued in paragraph below, a state law, the Allegheny County Jury Selection Statute could be the basis for clearly predicting 42 U. S. C. § 1981 denials. On the other hand, a federal law, 18 U. S. C. 245(b), was urged as another basis to predict denials under the labor provisions of the Civil Rights Act of 1964.

Even assuming that a displacement is necessary, the Court erred in not interpreting 245(b) in connection with the removal petitions, and the underlying factual allegations and circumstances inherent in all such cases. To say that the exclusion in 245(b) as to "aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot," necessarily eliminates Petitioners' claim since they have been charged with inciting to riot (and in one case other charges including aggravated assault and battery on a police officer), clearly begs the question.

In *Walker v. State of Georgia,* 417 F. 2d 1 (1969) and *Walker and Forman v. State of Georgia,* 417 F. 2d 5 (1969) (both Fifth Circuit Court of Appeals), removal was sought for criminal prosecutions on charges of riot, malicious mischief and other offenses, arising from a "sit-in" attempt to enforce the public accommodations provisions of the Civil Rights Act of 1964. The Court held in both that this Court had *not restricted* removal to state trespass prosecutions denying the rights of service under the public accommodations provisions. Moreover, in *Walker, supra,* at page 5, the Court stated "The petition for removal is to be determined not by the appellation or euphemism of the charge, but by what the movant was *actually* doing with respect to the exercise of his statutory federally protected right, as determined in a hearing for removal, that controls and not the characterization given to the conduct in question by a state prosecutor. . . . It is well settled that Section 1443(1) civil rights removal cases require a sufficient evidentiary hearing on the merits of the charges to determine whether the defendants are actually being prosecuted soley for peacefully attempting to gain equal access to places of public accommodations."

Therefore, 245(b) *may* work a displacement *if* the evidentiary hearing demonstrates that Petitioners were lawfully and peaceably exercising their equal civil rights, as the *Walker* cases, *supra,* suggested might be the case, where instead of trespass prosecutions, the state chose other charges such as rioting to frustrate enforcement of the public accommodations provisions. Applying the displacement test to the face of those removal petitions in *Walker,* clearly no displacement occurs and the petitions should be remanded. However, as the Court decided, the euphemism of the charges is not controlling, but rather

what the petitioners were *actually* doing at the time of their arrests. A similar analysis is required in the instant case.

Petitioners point to the enactment of Section 245 (b) as an expression of the Congress to provide protection to those who were active in the Civil Rights movement. The statute deals with persons who would interfere in attempts to secure certain civil rights which are spelled out in the body of the statute. Those civil rights read, textually, like a recapitulation of the Civil Rights Acts of 1964 and on, including the sections which Petitioners herein have relied upon.

The language of the statute is fairly clear. It prohibits intimidation and/or interference or injury by force of threat of force. This indicates strongly that Congress was contemplating just the situation presented here. Although the District Court found no specific authorization to march in the statutes relied upon by petitioners, it is apparent that to the Congress, there are times when passive action, arrived at through verbal exercise, must yield to more positive, physical forms of activity, such as the sit-in in *Rachel*, which was considered by this Court.

The Petitioners herein were attempting to become members of building trades unions so that they might be able to participate in construction which is taking place under the auspices of, or through grants from, the Federal Government. They were, in the words of Section 245 (b), not only seeking jobs for themselves, but also, "encouraging other persons to participate (in the benefits of Federally financed programs) without discrimination on account of race, color, or religion or national origin." For this, they were charged with inciting to riot.

The inciting to riot statute 18 Purdon's Penna. Statutes 4401, is in conflict with 18 U. S. C. 245 (b) for if the charge

can stand, then the situation becomes contradictory; both the Petitioners and the arresting officers would be criminally liable. Surely Congress, in passing Section 245 (b), did not intend this effect. Rather, 18 U. S. C. 245 (b) seems to be an attempt to chill those who would interfere with those who attempt to secure their civil rights. Hence, the effect is to make persons in the position of Petitioners here immune from prosecution, as in *Rachel.*

In *Rachel,* the petitioners could point to a specific section of the Public Accommodations section of the Civil Rights Act which made them immune from prosecution. Petitioners here have no such specific statute.

However, it appears as though Congress intended Section 245 to fill the gap which exists because of lack of an immunity statute. It seems that in the enforcement of a Public Accommodations Section, one could easily cause the enforcers to break trespass laws and other laws against property. Indeed, one would almost invariably have to do so. However, in enforcing the other rights, there was and is no way to clearly predict a uniform manner of attempting to gain rights which would invariably lead one to a breach of some law or other.

And, rather than create a blanket immunity, which, to say the least, would be dangerous, since even in the Civil Rights movement, there are those who are lawbreakers, Congress provided that those who interfere with lawful attempts to enforce affirmative equal civil rights, such as is presented here, would be punished.

It would follow that the Petitioners should be protected from prosecution, since such prosecution would be, at the least, suspect of being in bad faith and without a foundation in fact and in contravention of Section 245 (b) of Title 18 of the U. S. Code.

5. Petitioners have also urged that another basis for removal is that there is a clear prediction that 42 United States Code Section 1981 rights will be denied in the State Court due to the Jury Selection Statute existing in Allegheny County, Pennsylvania, the place of Petitioners' Criminal trials. The District Court failed to examine this issue at all. The Circuit Court erred in deciding that the jury selection statute had to be discriminatory on its face to meet the "denied or cannot enforce" requirement of removal cases. Even the original doctrine developed in the cases from *Strauder v. West Virginia, supra,* and *Virginia v. Rives,* 100 U. S. 313 (1880), to *Kentucky v. Powers,* 201 U. S. __ (1906) which reflected post-Reconstruction hesitancy to recognize Blacks as first-class citizens by limiting removal to the few instances of overt racism in state statutes or constitutional provisions drawing distinctions on the basis of color, expressed a qualification stated in *Rives* that this inability to enforce such rights is "primarily, *if not exclusively,* a denial of such rights, or an inability to enforce them resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case." 100 U. S. at 319 (emphasis supplied). However, now, removal is justified *"even in the absence of a discriminatory state enactment,* if an equivalent basis (can) be shown for an equally firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights in the state court" (Emphasis supplied), *Georgia v. Rachel, supra* at page 808.

This case fits in the *Strauder* line of cases, for petitioners will be denied their 42 United States Code Section 1981 rights because of the jury selection statute in Allegheny County.

Petitioners will be brought to trial in Allegheny County, Pennsylvania, and will be tried by a jury chosen from an array of jurors selected pursuant to the Pennsylvania Second Class County Jury Selection Statute, the Act of May 11, 1925 P. L. 561, 17 P. S. 1271, *et seq.* A challenge to the selection statute itself was made and denied in Allegheny County in 1970. The decision was not appealed. The results of that challenge are set forth in a brief filed by petitioners therein and was included in the Appendix (See 7A of the Circuit Court brief filed as part of the Circuit Court Record). The challenge there was to the Grand Jury Array. However, since petit jurors in Allegheny County are selected by the same process, the evidence, arguments and results of those hearings are completely applicable and relevant to the instant case.

As argued in those hearings and as evidenced by the testimony and exhibits presented in support thereof, the Selection Statute itself is discriminatory and unconstitutional on its face (See Grand Jury Challenge Brief, Part I), is unconstitutionally applied (See Grand Jury Challenge Brief, Part II), and is, in any event, not followed as carefully prescribed by law (See Grand Jury Challenge Brief, Part III). The end result is an array of jurors who in no way represent a fair cross-section of the population of Allegheny County, and in particular as it relates to Petitioners' case, is grossly and disproportionately underrepresented by Blacks so as to subject Petitioners to an unconstitutionally constituted jury, devoid of Blacks (See Grand Jury Challenge Brief, Part IV).[2] The underrepresentation is such that even given the minimal likelihood

[2] In the first quarter of 1970, no Blacks served on any of the three grand juries convened despite the fact that Blacks constitute 8% of the overall population of Allegheny County. (See Grand Jury Challenge Brief, p. 32).

that a few Blacks might make the array, the improbability of those few Blacks finding their way, without challenge for cause, into the jury box, is evident for experience teaches that it is far more than likely they would be removed peremptorily by the Commonwealth. To be subjected then to trial by an all white, predominantly suburban real property owner, unaware of any of the Black man's struggle, in particular for jobs, constitutes a denial of Petitioners' rights, pursuant to Section 1981 to the "equal benefit of all laws and proceedings for the security of persons" and to be "subject to like punishment, pains, penalties . . . and exactions of every kind, and to no other." 42 U. S. C. § 1981.[3]

Petitioners, therefore, contend that in reality and within the meaning of Section 1981 they have been denied their right to a mixed jury of Whites and Blacks. Thus, the federal district Court can discern with the same degree of certainty present in *Strauder* that petitioners' rights under Section 1981 will be denied if they face trial in Allegheny County. The removal statute "ensured that removal would be available only in cases where the predicted denial appeared *with relative clarity* prior to trial. It also ensured that the task of prediction would not involve a detailed

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[3] Petitioners recognize that they do not have the absolute right to be tried by a jury which proportionately mirrors the racial or class make-up of the community, *Virginia v. Rives, supra*, or even to have a specific jury of mixed racial composition. What they do contend is that they should have the opportunity to be tried by a jury of their peers, including their racial peers, an opportunity which they cannot have in the County of Allegheny. Petitioners urge that this Court take very seriously the following language from *Strauder*:

> The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. 100 U. S. at 308.

Thus delineated, these rights, as *Strauder* holds, are protected by section 1981.

analysis by a federal judge of the likely disposition of particular claims by particular state courts." *Georgia v. Rachel, supra,* at 803 (emphasis supplied).

The sensitivity of the federal judiciary to a claim such as that presented by Petitioners herein should be sweeping. The legislative history so indicates:

> If it be necessary in order to protect the freedman in his rights that he could have authority to go into the Federal Courts in all cases where a custom prevails in a State or where there is a statute-law of the State discriminating against him, I think we have the authority to confer that jurisdiction under the second clause of the (Thirteenth Amendment), which authorizes Congress to enforce by appropriate legislation the article declaring that 'neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States or in any place subject to their jurisdiction.' That clause authorizes us to do whatever is necessary to protect the freedman in his liberty. The faith of the nation is bound to do that; and if it cannot be done without, would have authority to allow him to come to the Federal Courts in all cases. Remarks of Senator Trumbull, Cong. Globe, 39th Cong., 1st Sess., at 1759.

Even in the constrictive opinion in *Rives,* this Court said, "It is a right to which every colored man is entitled, that in the selection of jurors to pass upon his life, liberty, or property, there will be no exclusion of his race, and no discrimination against them because of their color." 100 U. S. at 322-323. Here, the jury selection statute and its demonstrated results in Allegheny County guarantee that "exclusion" and that "discrimination" and thus gives rise to the "predicted denial" of rights under section 1981 which, even under the narrow *Rachel-Peacock* rule, justifies removal to a protective federal forum. If he does not have that right of removal, then the prophecy, now in 1971, is

fulfilled, "If he is wronged he has no remedy, for the courts are closed to him." Remarks of Rep. Donnelly, Cong. Globe, 39th Cong., 1st Session, at 589.[4]

6. Petitioners were entitled to an evidentiary hearing by the District Court prior to the remand of their cases. The Court of Appeals for the Fifth Circuit has steadfastly insisted that District Courts allow petitioners in removal cases an evidentiary hearing on a motion for remand. In *Walker v. Georgia, supra*, the court stated at page 5,

> "It is well settled that Section 1443(1) civil rights removal cases require a sufficient evidentiary hearing on the merits of the charges to determine whether the defendants are actually being prosecuted solely for peacefully attempting to gain equal access to places of public accommodations."

Such standards of fairness are equally applicable to other attempts to enforce affirmatively granted federal equal civil rights. In a companion case, *Walker and Forman v. Georgia, supra*, the court cited a construction of *Georgia v. Rachel, supra*, at page 8 (citing *Walker v. State*

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[4] In *Heymann v. Louisiana*, 269 F. Supp. 36 (E. D. LA., 1967), the district court stated, "The firm prediction can be made only where the prosecution itself is defective because of its conflict with an explicit federal right." Concededly, this quote characterized a *Rachel* removal case. However, as a general description of the removal doctrine, the quotation fails to take under consideration the circumstances in *Strauder* or in the instant case. In *Strauder* and as alternatively argued herein, it is not the *prosecution* which is claimed to be defective but rather, within the meaning of section 1981, the *proceedings* themselves. If the *Heymann* language were conclusive of a petitioner's 1443 (1) rights, the *Strauder* opinion is untenable But the confusion is easily unraveled. In a *Rachel* situation, the fact is that there can be no proceedings, state or federal, since the prosecution itself is unjustifiable under preemptive federal law. In a *Strauder* situation, as alternatively argued herein, the prosecution is, within the meaning of the removal law, free from defect, but in order to protect the federal civil rights of the petitioner, the *trial* itself must be conducted in a federal forum.

of Georgia, 405 F. 2d 1191 in which petitioners was charged with assault):

> "The requirement of *Rachel* is that the District Court is to conduct a hearing to determine whether appellant was being prosecuted solely for his peaceable and non-forcible attempt to gain service."

The Court of Appeals for the Fifth Circuit has held an evidentiary hearing to be necessary in many instances such as exercise of the voting rights granted by the Voting Rights Act of 1965, 42 U. S. C. A. § 1973 i (b) [*Whatley v. City of Vidalia*, 5 Cir., 399 F. 2d 521, 527 (1968)]; charge of aggravated burglary [*Wyche v. State of Louisiana*, 5 Cir. 394 F. 2d 927 (1967)], charge of vagrancy [*Achtenberg v. State of Mississippi*, 5 Cir., 393 F. 2d 468 (1968)], and petitioner already convicted of battery occurring outside of restaurant where he had gone to investigate alleged discrimination [*Wyche v. Hester*, 431 F. 2d 791, 5 Cir. (1970)]. See also *Jackson v. Vicksburg*, 361 F. 2d 473, 5 Cir. (1966), *Smith v. City of Drew*, 360 F. 2d 283, 5 Cir. (1966); and *Smith v. City of Jackson*, 358 F. 2d 705, 5 Cir. (1966) which suggests that a *full* evidentiary hearing must be afforded including *live* testimony citing many Fifth Circuit and District Court cases at p. 706.

Although this Court did not expressly require an evidentiary hearing in removal cases in *Rachel*, the right to a hearing was even more importantly *assumed* to exist. In *Rachel*, this Court stated, 384 U. S. 780, 805:

> Since the Federal District Court remanded the present case without a hearing, the defendants as yet have had no opportunity to establish that they were ordered to leave the restaurant facilities solely for racial reasons. If the Federal District Court finds that allegation true, the defendants' right to removal under § 1443(1) will be clear. The Strauder-Rives doctrine requires no more, for the denial in the courts of the

State then clearly appears without any detailed analysis of the likely behavior of any particular state court.

If the rule of *Rachel* with respect to evidentiary hearings is not followed, then an invidious result will occur. By denying the petitioners the right to prove the existence of grounds for removal, the District Court will be accepting the appellations of the District Attorney without allowing the petitioners the opportunity to place witnesses on the stand to prove that the allegations of the petition are true, that the charges are groundless and that the proceedings were instituted solely because of petitioners' civil rights activities. Such a result would destroy the underpinnings of civil rights removal, for it would effectively deny petitioners in such cases any forum for properly litigating their federal equal civil rights. In criminal cases of this type, there is no solace to petitioners and much encouragement of state violations of civil rights when the only relief is *expost facto.*

As both the Fifth Circuit and this Court have held, such a result was never contemplated and cannot be allowed.

Conclusion

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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On the Brief:
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,992-6
Nos. 19,215-20
No. 19,244
Nos. 19,304-9

LEE HILL, JOHNNY CLARK, FLOYD NORFLEET, NORMAN WILSON, THOMAS KELLY,
Appellants in Nos. 18,992-6,

v.

COMMONWEALTH OF PENNSYLVANIA.

COMMONWEALTH OF PENNSYLVANIA,

v.

PAUL LEONARD, LAWRENCE Y. LINGARD, JERRY B. WILLIAMS, FREDERICK T. WIMS, FRANCIS ROLLS, THOMAS E. BELL,
Appellants in Nos. 19,215-20.

COMMONWEALTH OF PENNSYLVANIA,

v.

EDWARD RAY,
Appellant in No. 19,244.

COMMONWEALTH OF PENNSYLVANIA,

v.

MARTIN FRANCKEN, ARNOLD WALKER, ALVIN RUE, ALVIN G. BAILEY, ROBERT WILLIAMS, and CHARLES A. BURNETT,
Appellants in Nos. 19,304-09.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued January 15, 1971
Before SEITZ, VAN DUSEN, *Circuit Judges*
and MASTERSON, *District Judge*.

Opinion of the Court

(Filed March 18, 1971)

SEITZ, *Circuit Judge*.

These consolidated appeals challenge orders of the district court granting the State's motions to remand to the Court of Common Pleas of Allegheny County, Pennsylvania, state criminal prosecutions against petitioners which were previously removed to the district court pursuant to 28 U. S. C. § 1443(1). We are thus presented with the delicate problem of determining whether petitioners' allegations, if proved, bring them within the ambit of legal principles which entitle them to have the charges determined in the first instance in a federal rather than a state court.

In No. 19,244, petitioner was charged under Pennsylvania law with aggravated assault and battery, assault and battery, participation in an unlawful assembly, and inciting to riot. In the remaining cases, petitioners were charged only with inciting to riot. All of these charges arose out of petitioners' actions during public demonstrations on August 26, 1969 in support of an attempt by the Black Construction Coalition to secure equal employment opportunities in the construction industry in the City of Pittsburgh.

For purposes of this appeal, the allegations in the various petitions for removal may be considered as identical.

Petitioners allege that they were lawfully and peaceably engaged in activities for the purpose of enforcing federally protected equal civil rights, that the sole purpose of their arrests was to deny them these rights, and that they have been denied or cannot enforce federally protected equal civil rights in the state courts of Pennsylvania.

Specifically, petitioners claim that pursuant to 28 U. S. C. § 1443(1) they must be afforded the protection of a federal forum in order to secure their rights guaranteed by 42 U. S. C. §§ 1981,[1] 1983, 2000(d), 2000e-2(a), (c) & (d), and 18 U. S. C. § 245(b).[2] They assert that this protection is necessary since we should be able to clearly predict that these rights will be denied in the state courts of Pennsylvania. They reason that we should be able to make this prediction since the mere pendency of the prosecutions denies them a federal right under 18 U. S. C. § 245(b), which they claim immunizes them from prosecution for the

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[1] "All persons within the jurisdiction of the United States shall have the same right in every state . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."

[2] In pertinent part this statute provides criminal penalties for:
"(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

* * *

"(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—. . . ."

Subparagraph (2)(C) protects one who is "applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency. . . ."

activities they were engaged in, and further, they will be denied their rights under 42 U. S. C. § 1981, since, according to Pennsylvania law, they will be tried before a jury which will be selected pursuant to 17 P. S. § 1276 which they claim is an unconstitutional statute.[3]

After a review of the relevant state records and argument upon the legal sufficiency of the petitions for removal, the district court held that petitioners were not entitled to removal under any state of facts which could be proved in support of their claims. The court reasoned that since the petitioners were charged with conduct which was not protected by federal law, and since the challenged jury selection statute did not, on its face, discriminate in terms of race, petitioners did not allege a proper basis for removal.

28 U. S. C. § 1443(1) permits removal to the federal district court of criminal prosecutions commenced in a state court:

> "[a]gainst any person who is denied or cannot enforce in the courts of such state a right under any law providing for equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof."

To justify removal under this section, petitioners must demonstrate that (1) they rely upon a specific civil right stated in terms of racial equality, and (2) a clear predic-

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[3] The district court correctly held that petitioners' reliance on 42 U. S. C. §§ 2000(d) and 2000e-2(a), (c) & (d) was misplaced for they did not allege that at the time of their arrests they were seeking employment or participating in a training or apprenticeship program. On the contrary, they alleged that they were encouraging others to enforce such rights. These statutes do not protect such encouraging activities. Nor does 42 U. S. C. § 1983 suffice to satisfy this requirement for petitioners did not claim that they were seeking civil redress for a deprivation of their civil rights in the pending state proceedings.

tion can be made that the right relied upon will be denied or not be enforceable in the state court. Georgia v. Rachel, 384 U. S. 780 (1966); City of Greenwood v. Peacock, 384 U. S. 808 (1966).

Petitioners meet the first requirement by their reliance on 42 U. S. C. § 1981 and 18 U. S. C. § 245(b), both of which specify civil rights stated in terms of racial equality.

In claimed fulfillment of the second requirement, petitioners assert that 18 U. S. C. § 245(b) in effect immunizes them from prosecution for their activities. Petitioners concede that there is no statute which specifically immunizes them from prosecution. They argue instead that since Congress made it a crime to interfere with those who attempt to assert their rights under Section 245(b) it follows that one who attempts to secure these rights is immune from prosecution for acts within the attempt. Petitioners assert that any other view of the statute would present an anomaly, for Congress would be deemed to have made it a crime to stop a criminal from acting. Petitioners argue that since they are immune from prosecution, any proceeding in the state court will necessarily deny them their rights protected by this immunity. They conclude that the second requirement for removal is met and they should therefore be permitted to remove the state criminal prosecutions to federal court where an evidentiary hearing should be conducted to determine whether they were acting lawfully and whether their arrests and prosecutions were means used to deny them their rights under Section 245(b). Our analysis commences with an examination of the Supreme Court precedents.

In *Georgia v. Rachel, supra,* petitioners sought to remove state trespass prosecutions arising out of their attempts to seek service at restaurants open to the public. The statute

under which they were indicted made it a crime to refuse to leave premises of another when requested to do so. Petitioners alleged that they refused to leave public accommodations when, solely for racial reasons, they were ordered to do so; therefore, they would be brought to trial solely as a result of peaceful attempts to exercise their federal rights of equal access to service at places of public accommodation. The first requirement for removal was satisfied by 42 U. S. C. § 2000a(a), which granted petitioners the equal access they sought.

In finding the second requirement for removal satisfied, the Court held that it was not necessary to establish that a denial of equal civil rights would stem from a legislative enactment or constitutional provision of the state. It was deemed sufficient if an equivalent basis could be shown for an equally firm prediction that the petitioners would be denied equal civil rights in the state courts. The Court was able to make the required prediction since 42 U. S. C. § 2000a-2 prohibited attempts to punish any person for attempts to exercise rights of equal access to service at public accommodations granted by 42 U. S. C. § 2000a(a). Two years previously, in *Hamm v. City of Rock Hill,* 279 U. S. 306 (1964), the Court had held that 42 U. S. C. § 2000a-2 prohibits prosecution of any person seeking service in a covered establishment because of his race or color. Hence, in *Rachel,* if the allegations in the removal petition were true, petitioners were immune from trespass prosecutions since they had a right not to be brought to trial because of their alleged activities. In the narrow circumstances of that case, any proceeding in the state court would deny the explicit right to be free from attempted punishment. The Court ordered that the district court was to determine in an evidentiary hearing whether petitioners

were ordered to leave the restaurant solely for racial reasons and, if that were so, that the removal be sustained and the prosecutions dismissed.

For reasons we shall develop, we think the instant case is not governed by the principles of *Rachel;* rather, in our view it is controlled by *City of Greenwood v. Peacock, supra.* In *Peacock,* petitioners were charged with, among other things, inciting to riot, disturbing the peace, and obstructing public streets. Petitioners alleged in their removal petitions that they were engaged in a drive to encourage Negro voter registration at the time of their arrests. Petitioners claimed that they were denied or could not enforce in a state court their rights under 42 U. S. C. §§ 1971 *et seq.,* which guarantee the right to vote free from discrimination and provide that no person shall attempt to intimidate, threaten or coerce another in order to interfere with this right. The Court denied removal and stated that the basic differences between the case before it and *Rachel* were that in *Rachel* petitioners (1) relied on a specific federal right that permitted them to remain on the property although such conduct violated state law, and (2) further relied on a federal right that prohibited a state from attempting to prosecute petitioners for their conduct. In *Peacock* no federal law conferred an absolute right upon petitioners to, for example, obstruct the streets and no federal law conferred immunity from prosecution on such charges.

The *Peacock* Court pointed out that in *Rachel* the statute relied upon explicitly provided that no person shall punish or attempt to punish any person for exercising the right claimed by engaging in the activities alleged. In contrast, the statutes relied upon by petitioners in *Peacock* provided that no person shall intimidate or attempt to intimidate

another in order to interfere with his right to vote.[4] In this context, after a "See also" signal, the *Peacock* Court referred to 42 U. S. C. § 1973i(b), enacted subsequent to the initiation of the state prosecution sought to be removed, which provides that no person shall intimidate or attempt to intimidate another for urging or aiding any person to vote. This statute arguably would have protected the petitioners' actions. There is some question whether the Court considered petitioners' alleged activities of encouraging others to vote in the context of Section 1973i(b),[5] but we believe that this would not have changed the outcome of the case. We say this because even if one considers Section 1973i(b), the situation in *Peacock* would have still lacked the distinguishing feature of *Rachel*, the statutory substitution of a right for a crime.

The statutes relied upon in *Rachel* necessarily displaced any state laws which would proscribe the act of remaining in public accommodations when asked to leave on account of race by prohibiting attempted punishment for this act. However, when statutes, such as those relied upon in *Peacock*, grant one a right not to be intimidated for efforts

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[4] It is Judge Sobeloff's view that statutes forbidding "attempts to intimidate" are more sweeping prohibitions of official acts of harassment than statutes proscribing "attempts to punish" since attempts to punish are only one means of intimidation. However, his interpretation of *Rachel* and *Peacock* is that a specific prohibition against state action which "attempts to punish" is necessary to confer immunity from prosecution. North Carolina v. Hawkins, 365 F.2d 559, 562-563 (4th Cir. 1966) (concurring opinion). The Fifth Circuit shares Judge Sobeloff's view concerning the implications of the words "punish" and "intimidate" but its interpretation of *Rachel* and *Peacock* does not preclude an application of this view. Whatley v. City of Vidalia, 399 F.2d 521, 525-526 (5th Cir. 1968). The Second Circuit has left the question open. New York v. Horelick, 424 F.2d 697, 702, n.4 (2d Cir. 1970).

[5] Compare New York v. Davis, 411 F.2d 750, 754, n.3 (2d Cir. 1969) with New York v. Horelick, *supra*, at 702 n.4 and Whatley v. City of Vidalia, *supra*, at 525-526.

to accomplish a particular goal or while asserting a specific right, we cannot ascribe to Congress an intent to displace state laws which regulate one's conduct while attempting to exercise the right unless, of course, the federal right permits specific acts which are proscribed by state law, or the state law, in effect, forecloses a reasonable possibility of engaging in acts necessary to assert the federal right. Without a displacement of state law we do not have a situation in which a federal right is substituted for a state crime; therefore the mere pendency of a prosecution based on state criminal laws does not provide the necessary basis to firmly predict that a federal right would be denied in state court.

The Court in *Peacock* recognized that a right not to be intimidated while seeking to accomplish a goal could be frustrated by specious arrests and subsequent criminal prosecutions. However, the Court held that such possibilities, similar to those here alleged, would not provide a basis to predict that the claimed right would inevitably be denied in a state court:

> "It is *not* enough to support removal under § 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any manner the defendant will be 'denied or cannot enforce in the courts' of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial." 384 U. S. at 827-828.

Section 245(b), which petitioners rely upon in the instant case, explicitly indicates that Congress did not intend to displace the state laws under which the petitioners were charged. By its own terms the statute provides:

> "[a]s used in this section, 'participating lawfully in speech or peaceful assembly' shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot."[6]

It is true that Section 245(b) makes it a crime to intimidate anyone, by force or threat of force, while he is lawfully encouraging others to seek equal employment. The petitioners therefore assert that it would be anomalous if they are not thereby immune from prosecution for their "encouraging" activities, for otherwise we would have a situation in which it is a crime to stop a criminal from acting. This anomaly, however, is more apparent than real for it assumes as a necessary premise that Congress intended to displace state laws which regulate the type of conduct allegedly here involved. The Senate Committee Report, in describing the purposes of the Act, disclaimed any intention to occupy the field or preempt state criminal laws, and specifically stated that in order to be under the Act's protection, one is required to be acting lawfully.[7]

In addition, it is clear that Section 245(b) is aimed only at intimidation by "force or threat of force" in the sense of violent activity. It was not intended to displace the ordered functioning of state legal processes, whatever the motivation of those instituting the prosecutions. New

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[6] See also 18 U. S. C. § 245(a) & (c).

[7] S. Rep. No. 721, 90th Cong., 2d Sess. (1968), 1968 U. S. Code Cong. & Admin. News 1844-46

York v. Horelick, 424 F.2d 697, 702-703 (2d Cir. 1970). Any other view would work the wholesale dislocation of the relationship between federal and state courts in the administration of criminal law which the Court warned against in *Peacock*.

If petitioners' allegations are true, there may be other civil or criminal remedies available to them under federal law.[8] But the only question we decide today is whether petitioners are entitled to remove their pending state prosecutions to a federal court under the provisions of 28 U. S. C. § 1443(1). We hold that Section 245(b) does not shield petitioners from prosecution for the crimes charged and therefore we cannot clearly predict a denial of petitioners' rights under Section 245(b) from the mere pendency of the state prosecutions.

As a second basis to predict that they will be denied their equal civil rights in state courts, petitioners rely upon 42 U. S. C. § 1981 and claim that the statute which provides for the selection of the jury before which they will be tried is unconstitutional on its face and as applied.

17 P. S. § 1276 provides for the selection of prospective jurors from lists of taxables on the county rolls. Petitioners assert that as a result of this statute Negroes will be disproportionately underrepresented on their jury. We need not express an opinion as to this assertion because the statute does not expressly exclude Negroes on its face. For purposes of determining removability we are bound to distinguish between a statute which on its face discriminates in terms of race, and one which is neutral on its face but is challenged as discriminatorily applied. Only in the former situation do we have the necessary basis to clearly

[8] City of Greenwood v. Peacock, *supra* at 828-30.

predict that petitioners will be denied their equal civil rights in the state courts.[5]

The posture of these cases on appeal does not put us in a position to determine whether petitioners' rights have been denied nor can we clearly predict that they will be denied in the state courts. What we decide today is merely that removal under Section 1443(1) is not appropriate in these cases.

The judgments of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[5] Chestnut v. New York, 370 F.2d 1 (2d Cir. 1966), *cert. denied*, 386 U. S. 1009 (1967). Compare Murray v. Louisiana, 163 U. S. 101, 105-106 (1896); Smith v. Mississippi, 162 U. S. 592, 600 (1896); Gibson v. Mississippi, 162 U. S. 565, 579-586 (1896); Bush v. Kentucky, 107 U. S. 110, 116 (1882); Neal v. Delaware, 103 U. S. 370, 386-393 (1880); Virginia v. Rives, 100 U. S. 313, 318-323 (1879), with Strauder v. West Virginia, 100 U. S. 303, 310-312 (1879). See City of Greenwood v. Peacock, *supra*, at 827-828; Georgia v. Rachel, *supra*, at 797-804 (1966).

Opinion

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
v.
LEE HILL, JOHNNY CLARK, FLOYD NORFLEET, NORMAN WILSON and THOMAS KELLY,
Defendants.

Civil Action No. 70-556.

This is a Petition seeking the removal of a criminal proceeding pending in the Criminal Division of the Court of Common Pleas of Allegheny County, Pennsylvania, pursuant to Section 1443 of Title 28 of the United States Code. In the State Court, a Grand Jury has indicted the five petitioners for the common law offense of inciting to riot, stemming from their activities on August 26, 1969, during public demonstrations in support of the Black Construction Coalition's attempt to secure equal employment opportunities in the construction industry.

Upon receipt and review of the Petition, the service and filing of which effectuates removal under the provisions of Section 1446(e) of Title 28 of the United States Code, the Court entered an Order on the 21st day of May, 1970, summoning the relevant State records and calling for argument upon the legal sufficiency of the Petition. Upon review of the Petition and State records and consideration

of the oral arguments and briefs of counsel and the law applicable herein, the Court is of the opinion that the instant criminal proceedings must be remanded to State jurisdiction.

Paragraph five is the essential allegation of the Petition, and it reads as follows:

> "5. Petitioners were arrested on Tuesday, August 26, 1969, at approximately 12:00 noon, by police officers of the City of Pittsburgh, *while lawfully and peacably marching* solely for the purpose of enforcing the affirmatively granted federal equal civil rights set forth above and secured, guaranteed and protected by the Constitution and laws of the United States, to wit the CIVIL RIGHTS ACT and in particular Title 42 United States Code, Sections 1981, 1983, 2000d, and 2000e-2 (a)(c) & (d), and the 1st and 14th amendments of the U. S. Constitution." (Emphasis supplied.)

It is the considered opinion of the Court that the facts as alleged are insufficient upon which to found a removal to this Court under 28 U. S. C. § 1443. The scope of removal under Section 1443 is circumscribed and the limits definitively stated in two companion cases decided by the Supreme Court of the United States, *Georgia v. Rachel*, 384 U. S. 780 (1965) and *Greenwood v. Peacock*, 384 U. S. 803 (1965). Of the two, the latter case governs here.

As interpreted by the Supreme Court in *Greenwood v. Peacock, supra*, at 821, subsection (2) of Section 1443 permits of removal only by federal officers and those acting under them. It is not alleged that petitioners herein were either federal officers or persons acting under federal officers and, accordingly, if petitioners were entitled to removal, it could only be pursuant to subsection (1) of Section 1443.

Subsection (1) affords a right of removal to any person who is denied or cannot enforce in the courts of a State

"a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof." However, it has been made plain in *Georgia v. Rachel, supra,* and *Greenwood v. Peacock, supra,* that one subjected to State prosecution for conduct allegedly in exercise of rights afforded by the First and Fourteenth Amendments to the Constitution is not within the contemplation of the removal provision.

Interpreting the scope of § 1443, the Supreme Court stated in *Georgia v. Rachel, supra,* at 792:

> "On the basis of the historical material that is available, we conclude that the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under § 1443, because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that § 1443 demands. As the Court of Appeals for the Second Circuit has concluded, § 1443 'applies only to rights that are granted in terms of equality and not to the whole gamit of constitutional rights . . .' 'When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U. S. C. § 1983 are sufficient examples, that confer equal rights in the sense vital to our way of life, of bestowing them upon all.' *New York v. Galamison,* 342 F. 2d 255, 269, 271. See also *Gibson v. Mississippi,* 162 U. S. 565, 585-586; *Kentucky v. Powers,* 201 U. S. 1, 39-40; *City of Greenwood v. Peacock,* post, p. 825."

In *Greenwood v. Peacock, supra,* twenty-nine members of a civil rights group engaged in a drive to encourage Negro

voter registration in Leflore County, Mississippi, were subjected to state criminal charges including obstructing public streets. While observing that a state prosecution upon a charge of obstructing public streets could, if given circumstances, deny First Amendment rights, the Court denied removal, stating at 825:

> "The First Amendment rights of free expression, for example, so heavily relied upon in the removal petitions, are not rights arising under a law providing for 'equal civil rights' within the meaning of § 1443(1). The First Amendment is a great charter of American freedom, and the precious rights of personal liberty it protects are undoubtedly comprehended in the concept of 'civil rights.' *Cf. Hague v. C. I. O.*, 307 U. S. 496, 531-532 (separate opinion of Stone, J.). But the reference in § 1443(1) is to '*equal* civil rights.' That phrase, as sur-review in *Rachel* of its legislative history makes clear, does not include the broad constitutional guarantees of the First Amendment."

Paragraph five of the Petition herein alleges that petitioners, at the time of their arrests, were marching in the City of Pittsburgh to express support for workers seeking equal employment opportunities in the construction industry. Without more, this conduct arguably may be protected by the First and Fourteenth Amendments to the Constitution. But the activity of marching, albeit for the purpose of expressing publicly the belief in certain equal civil rights afforded by federal laws, is not in itself an activity protected by those federal laws.

Although the instant Petition cites Sections 601 and 703 of the Civil Rights Act of 1964[1], a review of those sections indicates that they afford no specific protection for the conduct of marching, in which petitioners allegedly were engaged. The activities protected by those Sections con-

[1] 42 U. S. C. § 2000d and 42 U. S. C. § 2000e-2(a)(c) & (d).

sist of seeking employment or participation in training or apprenticeship programs but do not include marching or assembling in order to express sentiments publicly.

While removal is to be denied and the instant criminal proceeding remanded to state jurisdiction, petitioners are not precluded from raising defenses under the Constitution and laws of the United States in the state courts. And, should the state courts fail to afford due recognition to the federal constitutional rights of the petitioners, federal review may still be obtained through ultimate appeal to the Supreme Court of the United States or by application in the federal courts for writ of *habeas corpus*, once state remedies have been exhausted.

An appropriate Order is entered.

ORDER

NOW, this 9th day of June, 1970, it is hereby ORDERED that the case of *Commonwealth of Pennsylvania v. Lee Hill, Johnny Clark, Floyd Norfleet, Norman Wilson and Thomas Kelly* be and the same is hereby remanded to the Court of Common Pleas of Allegheny County, Pennsylvania, and it is FURTHER ORDERED and DIRECTED that the Clerk of Court return to the Clerk of the Court of Common Pleas forthwith all State records previously submitted to this Court.

/s/ WALLACE S. GOURLEY, *SDJ*,
Senior District Judge.

cc: Robert W. Duggan,
District Attorney of Allegheny County,
Pittsburgh, Pennsylvania 15219.

Harry F. Swanger, Esquire,
400 Law & Finance Building,
Pittsburgh, Pennsylvania 15219.

Honorable Henry Ellenbogen, President Judge,
Court of Common Pleas,
Pittsburgh, Pennsylvania 15219.

Honorable Robert Van Der Voort,
Court of Common Pleas,
Pittsburgh, Pennsylvania 15219.

Petition for Removal

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
vs.
LEE HILL, JOHNNY CLARK, FLOYD NORFLEET, NORMAN WILSON and THOMAS KELLY,
Defendants.

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70 556.

To the United States District Court for the Western District of Pennsylvania:

Petitioners show to this Court:

1. Petitioners are the defendants in the above entitled prosecution.

2. The prosecution was commenced in the Police Magistrate's Court at No. 1 Police Station of the City of Pittsburgh, by the filing of a complaint on August 26, 1969, alleging charges of inciting to riot, conspiracy to commit an unlawful act and unlawful assembly in violation of the statutory law and common law of the Commonwealth of Pennsylvania, a copy of which is attached hereto, made a part hereof and marked "EXHIBIT A."

3. Following a preliminary hearing in said court on September 17, 1969, Petitioners were held for Grand Jury action on the charges of inciting to riot only. Petitioners were each indicated by the Allegheny County Grand Jury on the charge of inciting to riot and now are awaiting trial in the Criminal Court of Allegheny County on said charge. A copy of said indictment is attached hereto, made a part hereof and marked "EXHIBIT B."

4. On Tuesday, August 26, 1969, prior to and at the time of their arrest, Petitioners were lawfully and peaceably engaged in free speech activities on public property in the City of Pittsburgh, Pennsylvania, consisting of a march in support of the desire of all Black citizens, and in particular members of the Black community in Pittsburgh and their representatives in contract negotiations, the Black Construction Coalition, to not be discriminated against because of their race or color, in selecting and following any lawful occupation, in entering and enforcing contracts of employment, in participating in an activity aided by Federal Funds, in seeking and keeping employment opportunities without being deprived limited, segregated, or classified in anyway or otherwise adversely affected as an employee by employers or labor organizations, in seeking and maintaining membership in labor organizations and in seeking admission to or employment in apprenticeship or other train-

ing or retaining by a labor organization or joint labor-management committee and to not be denied any of the foregoing under color of state law, and to be free to aid, encourage other persons to so participate.

5. Petitioners were arrested on Tuesday, August 26, 1969, at approximately 12:00 noon, by police officers of the City of Pittsburgh, while lawfully and peaceably marching solely for the purpose of enforcing the affirmatively granted federal equal civil rights set forth above and secured, guaranteed and protected by the constitution and laws of the United States, to wit the CIVIL RIGHTS ACT and in particular Title 42 United States Code, Sections 1981, 1983, 2000d, and 2000e-2 (a)(c) & (d), and the 1st and 14th Amendments of the U. S. Constitution.

6. The sole purpose and motivation for Petitioners' arrest was to deny them their affirmatively granted Federal equal civil rights relating to employment, labor organization participation, and job training and apprenticeship set forth more fully above, and the City of Pittsburgh Police and the Stadium Authority of the City of Pittsburgh, under color of law have so acted to deprive and deny them their said civil rights in violation of the said United States Statutes and the United States Constitution.

7. The inevitable result of the foregoing conduct of Petitioners will be that they will be convicted of the pending charges solely because they were attempting to enforce their affirmatively granted federal equal civil rights set forth above, and by reason of their arrest, prosecution and their pending trial, they are denied and cannot enforce in the judicial tribunals of the Commonwealth of Pennsylvania their aforesaid affirmatively granted federal equal civil rights, and will continue to be denied and be unable to enforce said rights.

Wherefore, Petitioners pray that the complaint and its prosecution be removed into the United States District Court for the Western District of Pennsylvania, for trial pursuant to Section 1443 of Title 28 of the United States Code.

HARRY F. SWANGER,
HARRY F. SWANGER,
Attorney for Petitioners,
400 Law and Finance Building,
Pittsburgh, Pennsylvania 15219,
232-3334.

AFFIDAVIT

Commonwealth of Pennsylvania, }
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for said Commonwealth and County, personally appeared FLOYD NORFLEET, who being first duly sworn by law, deposes and says that the statements contained in the foregoing Petition are true and correct to the best of his knowledge, information, and belief.

/s/ FLOYD NORFLEET.

Subscribed and sworn to before me
this 13th day of May, 1970.
/s/ Lois Schramm,
Notary Public.

AFFIDAVIT

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for said Commonwealth and County, personally appeared NORMAN WILSON, who being first duly sworn by law, deposes and says that the statements contained in the foregoing Petition are true and correct to the best of his knowledge, information, and belief.

/s/ NORMAN WILSON.

Subscribed and sworn to before me
this 13th day of May, 1970.
/s/ Lois Schramm,
Notary Public.

AFFIDAVIT

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for said Commonwealth and County, personally appeared THOMAS KELLY, who being first duly sworn by law, deposes and says that the statements contained in the foregoing Petition are true and correct to the best of his knowledge, information, and belief.

/s/ THOMAS KELLY.

Subscribed and sworn to before me
this 13th day of May, 1970.
/s/ Lois Schramm,
Notary Public.

Criminal Complaint

N. B.—This form was drawn to conform to the requirements of Rules 104 and 105 of the Rules of Criminal Procedure adopted by the Supreme and Superior Courts of Pennsylvania on June 30, 1964, effective January 1, 1965.

COMMONWEALTH OF PENNSYLVANIA,
vs.
WILLIAM R. MORAN, 114 Overlook Dr., 21-W,
LEE HILL, 7229 Tioga St., 24-B,
ANTHONY KAMINSKI, Pgh. Press, W,
JOHNY CLARK, 7624 Hamilton Ave., B,
FLOYD NORFLEET, 2-P, Millvue Acres, Clairton, 19-B,
NORMAN WILSON, 2661 Stratmore Ave., 25,
JEROME MONTGOMERY, 352 Hamilton Ave., 19,
juvenile,
THOMAS KELLY, 1221 N. Franklin, ~~27~~ 31.

(Note: Include both name and address of each defendant; if unknown see Instructions.)

Commonwealth of Pennsylvania, }
County of Allegheny. } ss.:

I, the undersigned, do hereby state under oath (affirmation) the following:

My name is Ralph L. McMillan and I reside at Special Operations Divn.

I hereby accuse the person/s listed herein and who reside/s at the listed address/es, with violating the penal (criminal) laws of this Commonwealth.

The offense/s occurred in the City of Pittsburgh, Pa. in the County of Allegheny, Pennsylvania on August 26th, 1969.

The offense/s committed by the accused is/are described as follows: That the defendant/s unlawfully did wilfully incite, encourage and endeavor to provoke and instigate divers persons to-wit, approximately 100 persons to unlawfully and riotously assemble and gather together to disturb the peace of this Commonwealth and to injure and annoy and to create terror among the citizens thereof.

AND IN THE CITY OF PITTSBURGH, COUNTY AFORESAID on the above date the defendants unlawfully and wilfully did meet together with three or more persons to the disturbance of the public peace and with the intention of cooperating in the forceful execution of some unlawful enterprise.

AND IN THE CITY OF PITTSBURGH, COUNTY AFORESAID on the above date the defendants unlawfully did wilfully and maliciously conspire and agree together, with divers other persons whose names are presently unknown, to do and commit certain unlawful and illegal acts, that is to say, did conspire to pull the Officers away from their assigned duty at the Black Coalition Demonstration at the U. S. Steel Bldg. by disrupting traffic in the downtown area at five to six different locations at the same time.

INCITING TO RIOT
UNLAWFUL ASSEMBLY
CONSPIRACY TO DO UNLAWFUL ACT

all of which is contrary to the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

I ask that a warrant of arrest or a summons be issued and that the accused be required to answer the charges I have made.

I hereby swear to (affirm) the within complaint upon my knowledge, information and belief, and on information from reliable sources and which I verily believe to be true and correct and I sign this complaint in the presence of John W. Chapas, a Justice of the Peace/Alderman/Magistrate, on this 26th day of August, 1969.

RALPH L. McMILLAN,
(Affiant).

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Personally appeared before me on this 26th day of August, 1969, the affiant above named who, being duly sworn (affirmed) according to law, signed the aforesaid complaint in my presence and deposed and said that the facts set forth therein are true and correct to the best of his/her knowledge, information and belief.

JOHN W. CHAPAS, (SEAL)
Justice of the Peace/Alderman/Magistrate.

CERTIFICATION

AND NOW, this 26th day of August, 1969, I certify that this complaint has been properly sworn to (affirmed) and executed before me, and I believe the within affiant to be

a responsible person and that there is probable cause for the issuance of process.

JOHN W. CHAPAS,
Justice of the Peace/Alderman/Magistrate.

Indictment

COURT OF COMMON PLEAS
ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

December Sessions 1969

COMMONWEALTH OF PENNSYLVANIA,

vs.

LEE HILL; JOHNNY CLARK; FLOYD NORFLEET; NORMAN WILSON; and THOMAS KELLY.

THE GRAND JURY OF ALLEGHENY COUNTY, by this Indictment presents that, on August 26th, 1969, in the said County, the said Lee Hill; Johnny Clark; Floyd Norfleet; Norman Wilson; and Thomas Kelly with intent then and there to disturb the peace of the said Commonwealth, and devising and intending to create riots, unlawfully, wickedly and maliciously did then and there incite, encourage and endeavor to provoke and instigate divers citizens of the said Commonwealth whose names are to this Inquest unknown, to unlawfully, riotously and tumultously assemble and affray and gather together to the number of three and upwards, to disturb the peace of the Commonwealth and to injure and annoy citizens thereof,

and to create terror among the good citizens of this Commonwealth, to the evil example of all others in like case offending, all of which is against the peace and dignity of the Commonwealth.

ROBERT W. DUGGAN,
Attorney for the Commonwealth.

WITESSES:
Ralph L. McMillan.

December

No. 202 1969

Complaint No. 8119

COMMONWEALTH OF PENNSYLVANIA,

vs.

LEE HILL; JOHNNY CLARK; FLOYD NORFLEET; NORMAN WILSON; and THOMAS KELLY.

INDICTMENT:

Inciting to Riot.

Prosecutor Ralph L. McMillan.

Grand Jury Action on Dec. 9, 1969.

Approved

(Signature illegible) Foreman.